Cherry Auto Parts, Inc. *and* Teamsters Local No. 20 a/w International Brotherhood of Teamsters. Case 8–CA–38029

April 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and amended charges filed by the Union on November 5, December 1 and 29, 2008, respectively, the General Counsel issued the complaint on December 31, 2008, against Cherry Auto Parts, Inc., the Respondent, alleging that it has violated Section 8(a)(5), (3), and (1) of the Act. The Respondent failed to file an answer.

On February 23, 2009, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on February 25, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment[1]

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that the answer must be received by the Regional Office on or before January 14, 2009. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated January 28, 2009, notified the Respondent that unless an answer were received by February 4, 2009, a motion for default judgment would be filed.[2]

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Ohio corporation, with its office and place of business located in Toledo, Ohio, has been engaged in the retail sale of used automobile parts. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting the business operations described above, derived gross revenues in excess of $500,000 and received goods valued in excess of $50,000 directly from points located outside the State of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Teamsters Local No. 20 a/w International Brotherhood of Teamsters, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Nevin Liber held the position of the Respondent's president, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent, the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All working foreman, mechanic, counterman, parts man, burner, inside dismantle, and utility man employees employed by the Employer, excluding all office personnel, computer tech personnel, marketing/sales representatives, and all other employees as defined in the Act.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The General Counsel's brief in support of the motion for default judgment indicates that the copy of the complaint sent by certified mail on December 31, 2008, was subsequently returned to the Regional Office as "unclaimed" by the Respondent. On January 28, 2009, the Region sent by regular and certified mail to the Respondent a copy of the complaint and letter advising the Respondent of its obligation to file an answer to the complaint. Neither mailing was returned to the Regional Office; the documents sent by certified mail were unclaimed. On February 12, 2009, the Region sent a letter to the address of the Respondent's designated agent, as listed in the Ohio Secretary of State's website showing that the Respondent is an active corporation, noting the issuance of the complaint and extending the deadline to file an answer to February 19, 2009. The Respondent did not file an answer or respond to the letters. It is well settled that a respondent's failure or refusal to accept certified mail or to provide for appropriate service cannot serve to defeat the purposes of the Act. See, e.g., *I.C.E. Electric, Inc.*, 339 NLRB 247 fn. 2 (2003), and cases cited therein. Further, the failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Lite Flight, Inc*., 285 NLRB 649, 650 (1987).

Since at least 1970, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and, since then, the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from October 1, 2003, to September 30, 2009.

At all times since 1970, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

1. On about October 29, 2008, the Respondent notified its employees that they would be laid off and that the Respondent was closing its facility.

2. The following named employees who were represented by the Union in the unit were laid off on October 29, 2008: Michael Broman, Jack Hartford, Erick Heard, Richard Roberts, Harold Sparks, Greg Stewart, and Jason Wallace.

3. Since about October 29, 2008, the Respondent has continued to operate and is using low-seniority unit employees and nonbargaining unit employees to perform bargaining unit work that was formerly performed by laid off unit employees.

The subjects set forth above in paragraphs 1–3 relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

The Respondent engaged in the conduct described above in paragraphs 1–3 because the named employees joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

4. Since about October 29, 2008, the Respondent, through Nevin Liber, has failed and refused to bargain with the Charging Party Union regarding its conduct set out above in paragraphs 1–3**.**

CONCLUSIONS OF LAW

1. By the acts and conduct described above in paragraphs 1–4, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. By the conduct described above in paragraphs 1–3, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act.

3. By the conduct described above in paragraphs 1–4, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.

4. The unfair labor practices of the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) by laying off Michael Broman, Jack Hartford, Erick Heard, Richard Roberts, Harold Sparks, Greg Stewart, and Jason Wallace, we shall order the Respondent to offer these employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further, the Respondent shall make these employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3] The Respondent shall also be required to expunge from its files any and all references to the unlawful layoffs of Michael Broman, Jack Hartford, Erick Heard, Richard Roberts, Harold Sparks, Greg Stewart, and Jason Wallace, and to notify them in writing that this has been done and that the unlawful layoffs will not be used against them in any way.

Further, having found that Respondent has failed and refused to meet with the Union and that by this conduct the Respondent has been failing and refusing to bargain collectively and good faith with the Union as the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5), we shall order the Respondent, on request, to meet and bargain in good faith with the Union with respect to wages, hours, and other terms and conditions of employment.

In addition, having found that the Respondent violated Section 8(a)(5) by failing and refusing to bargain with

[3] In the complaint, the General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516 at fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

the Union specifically with respect to its decisions to close its facility; to lay off the above-named employees; and to continue to operate using low-seniority unit employees and nonbargaining unit employees to perform bargaining unit work, we shall order the Respondent, on request, to bargain with the Union about these decisions and/or the effects of its decisions.[4]

Finally, we shall order the Respondent to preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

ORDER

The National Labor Relations Board orders that the Respondent, Cherry Auto Parts, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Notifying its employees that they would be laid off and that the Respondent was closing its facility, because the employees form, join, or assist the Union, or any other labor organization, or engage in concerted activities, or to discourage employees from engaging in these activities.

(b) Laying off its employees because the employees form, join, or assist the Union, or any other labor organization, or engage in concerted activities, or to discourage employees from engaging in these activities.

(c) Continuing to operate using low-seniority unit employees and nonbargaining unit employees to perform bargaining unit work that was formerly performed by laid-off unit employees because the employees form, join, or assist the Union, or any other labor organization, or engage in concerted activities, or to discourage employees from engaging in these activities.

(d) Failing and refusing to meet and bargain collectively and in good faith with Teamsters Local No. 20 a/w International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the following unit, with respect to wages, hours, and other terms and conditions of employment:

> All working foreman, mechanic, counterman, parts man, burner, inside dismantle, and utility man employees employed by the Employer, excluding all office personnel, computer tech personnel, marketing/sales representatives, and all other employees as defined in the Act.

(e) Failing and refusing to bargain collectively and in good faith with the Union with respect to its decisions and the effects of its decisions to close its facility; to lay off unit employees; and to continue to operate using low-seniority unit employees and nonbargaining unit employees to perform bargaining unit work.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael Broman, Jack Hartford, Erick Heard, Richard Roberts, Harold Sparks, Greg Stewart, and Jason Wallace reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Michael Broman, Jack Hartford, Erick Heard, Richard Roberts, Harold Sparks, Greg Stewart, and Jason Wallace for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Michael Broman, Jack Hartford, Erick Heard, Richard Roberts, Harold Sparks, Greg Stewart, and Jason Wallace, and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful layoffs will not be used against them in any way.

(d) On request, meet and bargain with the Union as the exclusive collective-bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment.

(e) On request, meet and bargain with the Union with respect to its decisions and the effects of its decisions to close its facility; to lay off unit employees; and to continue to operate using low seniority unit employees and nonbargaining unit employees to perform bargaining unit work.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form,

[4] The General Counsel seeks a limited back pay, effects-bargaining remedy under *Transmarine Navigation*, 170 NLRB 389 (1968). Such a remedy is unnecessary, however, in light of the circumstances here and the other relief that we are granting, which will fully address the violations of Sec. 8(a)(3) and 8(a)(5) found.

necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Toledo, Ohio, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since about October 29, 2008.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT notify our employees that they will be laid off and that we are closing our facility because they form, join, or assist the Union or any other labor organization, or engage in concerted activities, or to discourage you from engaging in these activities.

WE WILL NOT lay off our employees because they form, join, or assist the Union or any other labor organization, or engage in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT continue to operate using low-seniority unit employees and nonbargaining unit employees to perform bargaining unit work that was formerly performed by laid-off unit employees because the employees form, join, or assist the Union or any other labor organization, or engage in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT fail and refuse to meet and bargain collectively and in good faith with Teamsters Local No. 20 a/w International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the following unit with respect to wages, hours, and other terms and conditions of employment:

All working foreman, mechanic, counterman, parts man, burner, inside dismantle, and utility man employees employed by us, excluding all office personnel, computer tech personnel, marketing/sales representatives, and all other employees as defined in the Act.

WE WILL NOT fail and refuse to meet and bargain collectively and in good faith with the Union with respect to our decisions and/or the effects of our decisions to close our facility; to lay off unit employees; and to continue to operate using low seniority unit employees and nonbargaining unit employees to perform bargaining unit work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Michael Broman, Jack Hartford, Erick Heard, Richard Roberts, Harold Sparks, Greg Stewart, and Jason Wallace reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Michael Broman, Jack Hartford, Erick Heard, Richard Roberts, Harold Sparks, Greg

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice readying "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Stewart, and Jason Wallace for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful layoffs of Michael Broman, Jack Hartford, Erick Heard, Richard Roberts, Harold Sparks, Greg Stewart, and Jason Wallace, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL, on request, meet and bargain with the Union as the exclusive collective-bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment.

WE WILL, on request, meet and bargain with the Union with respect to our decisions, and the effects of our decisions, to close our facility; to lay off unit employees; and to continue to operate using low seniority unit employees and nonbargaining unit employees to perform bargaining unit work; and if an understanding is reached, embody the understanding in a signed agreement.

CHERRY AUTO PARTS, INC.